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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: WAC-02-083-51952 Office: California Service Center Date: MAY 29 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the sciences. The director determined the petitioner had not established the beneficiary's sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel argues that the director's reference to the beneficiary as the petitioner demonstrates a lack of attention to the record. We find that the director's error in that regard is an inadvertent error that does not reflect on his attention to this petition. The director in this case issued a request for additional documentation, a subsequent notice of intent to deny and a detailed decision. Thus, we see no evidence of the director's lack of consideration of the record. Counsel's remaining arguments will be discussed below.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term 'extraordinary ability' means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Bureau regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that the beneficiary has sustained national or international acclaim at the very top level.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as a senior sensor scientist. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. On appeal, counsel appears to be accusing the director of considering each criterion separately instead of viewing the evidence as a whole. While the evidence as a whole must create a clear picture that the beneficiary is one of the very few at the top of his field and that he has sustained national acclaim, three of the ten criteria must be met. The list of ten objective criteria relieves the Service of relying on the subjective opinions of members of the beneficiary's field, sincere as they may be. Only when the evidence is indicative of national acclaim in three separate areas can the petitioner establish a beneficiary's eligibility. The petitioner has submitted evidence that, it claims, meets the following criteria.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Initially, counsel asserted that the beneficiary meets this criterion with no explanation of what evidence supported that assertion. In his evidence list, counsel references a letter from Professor [redacted] of Ulm University. Professor [redacted] asserts that the beneficiary and he received the "Merckle Forschungspreis" for their work on a continuous glucose monitor. The petitioner also submitted a copy of the award.

On March 4, 2002, the director requested that the petitioner submit documentary evidence of the claimed awards and provide evidence to establish the national or international significance of these awards. Counsel's response did not address this issue. On August 20, 2002, the director issued a notice of intent to deny. In this notice, the director stated: "The Merckle-Research award received by the beneficiary from the university must be a **lesser nationally or internationally recognized award**. There is no evidence of this." (Emphasis in original.)

In response counsel stated:

> The Merckle Research Award. The award is self-explanatory. However, we submit additional information about the award's origin, its criteria for judging and the scope of the award in Germany which shows that the award is merit-based for significant advances in research at one of the distinguished science/medical universities in Germany.

The petitioner submitted information regarding the Merckle pharmaceutical company and its research awards. The information indicates that Merckle awards the annual prize to researchers at the University of Ulm. In addition:

> The Merckle Research Prize honors outstanding, proven scientific performance over a longer period of time which is suited for opening up new directions for research work

> or providing the foundation for further scientific investigations. The faculties participating are Medicine, the Sciences, Mathematics, Economics and Business, Engineering, and Computer Science.

The director concluded that this information was insufficient to establish that the beneficiary meets this criterion. On appeal, counsel does not argue that the Merckle research award is sufficient. Rather, counsel states:

> Another example of the piecemeal approach of the decision is in the discussion of major awards where the decision focuses on the Merckle award to the exclusion of the patents, U.S. and European, that [the beneficiary] was awarded for his inventions in the field. The criteri[on] of awards is not limited to those given in ceremonies and a patent is as valid as any other award in the field because it is given for an invention that [is] both novel and useful.

At no time in the original submission, in response to the request for additional documentation or in response to the notice of intent to deny, did counsel ever claim that the patents constituted nationally or internationally recognized awards for excellence. Counsel's prior discussion of the patents related only to the criterion for contribution of major significance, discussed below. Thus, counsel cannot reasonably criticize the director for failing to consider an argument which, prior to appeal, had never been made. Regardless, we concur with the director that the beneficiary does not meet this criterion.

First, an award for which only scientists at a single university compete cannot be considered evidence that the winner is at the top of his field when compared with scientists nationally. Second, the award is for promising research as opposed to major breakthroughs in the field. Thus, we concur with the director that the Merckle award is not evidence of the beneficiary's national acclaim in the field of endeavor.

Finally, the director's failure to consider the patents as awards for excellence is not error as patents are not awards or prizes. Patents are issued to the inventors of original processes or devices that are useful. No evaluation as to the significance of the invention is made.[1] It is a property right, not an award for excellence. We note that this office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215, 221 n. 7, (Comm. 1998). If a patent is not sufficient to establish eligibility for a lesser classification, the national interest waiver for aliens with exceptional ability or advanced degree professionals, it is certainly not evidence of national or international acclaim.

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[1] While the United States requires that the invention be "useful," the Mirriam-Webster Dictionary 759 (1974) defines "useful" as "capable of being put to use: advantageous." The same dictionary defines "excellence" as "the quality of being excellent," defined as "very good of its kind: first-class." *Id.* at 250. Thus, recognition of the development of a novel and useful process is not a competitive award for excellence in the field.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

Counsel did not claim that the beneficiary meets this criterion. In his notice of intent to deny, the director noted that while the beneficiary claimed to be a member of the European Association for the Study of Diabetes and the American Diabetes Association, the record did not include any evidence of their membership requirements. In response, counsel stated that these memberships were "intended only to reflect [the beneficiary's] membership in prestigious organizations." Thus, the director concluded that this criterion had not been met. Counsel does not challenge this determination on appeal and we concur with the director.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

In response to the director's request for additional documentation, the petitioner submitted a letter from Dr. [redacted] Editor-in-Chief for *Diabetes Technology and Therapeutics*. Dr. [redacted] asserts that the beneficiary is a reviewer for the journal. The director concluded that the beneficiary met this criterion. On appeal, counsel notes the director's conclusion and asserts that the director failed "to see the forest for the trees" by acknowledging that the beneficiary meets this criterion but finding the remaining evidence insufficient. The regulations require that an alien meet three of the ten criteria. Thus, by definition, an alien can meet one and even two criteria and still not demonstrate the type of national acclaim required for eligibility.

Moreover, the evidence relating to this criterion is not indicative that the beneficiary is one of the very few at the top of his field or that he has national acclaim. Dr. [redacted] states, "I would only ask a capable reputable scientist, like [the beneficiary] to provide this type of evaluation." A capable reputable scientist does not necessarily have the national or international acclaim required for this classification. Thus, the minimal nature of the evidence relating to this single criterion does not suggest to us that the director must have overlooked other evidence of the beneficiary's national acclaim relating to the remaining criteria. We cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field; not every peer reviewer enjoys sustained national or international acclaim. Without evidence that sets the beneficiary apart from others in his field, such as evidence that he has reviewed an unusually large number of articles, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, we cannot conclude that the beneficiary meets this criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

Counsel has asserted that the witness letters and patents serve to meet this criterion. Dr. [redacted] Vice President for Sensor Development with the petitioning company, discusses the importance of the first generation continuous glucose monitoring system approved by the FDA in June 1999, prior to the beneficiary's employment with the petitioner, for which Dr. [redacted] was

responsible. Dr. [redacted] asserts that future generations of this system will have far greater utility. Finally, Dr. [redacted] states that the beneficiary is the lead scientist for the program and that the beneficiary's efforts "are allowing us to meet the design specifications for the next generation product." Dr. [redacted] does not identify any specific improvement that the beneficiary had already developed prior to the date of filing. Thus, it is not clear that, at the time of filing, the beneficiary had already made a contribution of major significance during his year working for the petitioning company.

Dr. [redacted] Chairman of the Glucose Monitoring Study Group, confirms that the beneficiary was a member of that group from June 1998 until January 2000. The group was initiated and sponsored by Roche Diagnostics GmbH, Germany. The beneficiary was involved with the technical development and clinical investigation of glucose sensors.

Professor [redacted] a professor at the University of Ulm, discusses his collaboration with the beneficiary as follows:

> Five years ago we were starting a cooperation with the Institute of Diabetes Technology at the University of Ulm in order to develop a portable device for continuous glucose monitoring. [The beneficiary] was not only the leading scientist in the Institute of Diabetes-Technology, but also the key-person in the cooperation between my team and the institute. He had to oversee the technical part, including the specification of the microelectronics and sensor design, and the requirements of the medically and biologically related aspects like sensor performance in the body and biocompatibility.
>
> Due to his extraordinary educational background and his abilities in leading and motivating, we succeeded in developing one of the first monitor[s] for continuous tissue glucose sensing. The work was presented to the scientific community at several international conferences. In close cooperation with the biomedical industry (Roche Diagnostics) the sensor has been evaluated in clinical trials.

Dr. [redacted] the Medical Director of the Kandertal Hospital, provides:

> I first met [the beneficiary] when I performed a clinical study with his group investigating the feasibility and applicability of continuous glucose monitoring in patients with diabetes. In this study, we showed the first time worldwide that continuous glucose monitoring could be an effective tool for adjusting insulin therapy. These data were presented at international conferences on diabetes. This new technology, which was developed by the group of [the beneficiary] will revolutionize diabetes treatment.

Dr. [redacted] of the Department of Nutrition, Endocrinology and Diabetes at the Free University of Berlin provides similar information. His knowledge of the latest information in the field of diabetes treatment is questionable, however, as he asserts in his December 12, 2000 letter that the beneficiary's

work "could finally lead to the first glucose sensor" when the FDA approved Dr. [redacted] glucose sensor in June of 1999.

Dr. [redacted] Director of Research and Development at Roche Diagnostics Corporation, discusses his collaboration with the beneficiary through the Institute of Diabetes Technology in Ulm, Germany. Dr. [redacted] asserts that the beneficiary was the project coordinator and leader for designing and conducting clinical studies on continuous glucose sensors. Dr. [redacted] continues that the beneficiary "was also instrumental in the design of research instruments which allow the study of glucose fluctuations in diabetic patients."

The record does not contain independent corroboration of the importance of the study group or the beneficiary's contribution to it. For example, the record contains no media coverage of the study's results or evaluations from major diabetes associations in Europe where it took place or the United States. Moreover, as will be discussed below, there is no evidence that the published conclusions of the study group have been widely cited.

The above letters are all from researchers who have collaborated with the beneficiary. The ten regulatory criteria at 8 C.F.R. § 204.5(h)(3) reflect the statutory demand for "extensive documentation" in section 203(b)(1)(A)(i) of the Act. Opinions from witnesses whom the petitioner has selected do not represent extensive documentation. Independent evidence that already existed prior to the preparation of the visa petition package carries greater weight than new materials prepared especially for submission with the petition. Moreover, as stated above, the requirement for objective evidence in at least three areas relieves the Service from relying on the subjective opinions of an alien's colleagues, regardless of their prestige and credibility. Finally, letters from the beneficiary's immediate circle of colleagues cannot establish that he is nationally or internationally acclaimed beyond his collaborators. Letters from independent experts who had heard of the beneficiary and his work prior to the preparation of the petition would be more persuasive.

Regarding the patents, as stated above, this office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dept. of Transportation, supra*, at 221 n. 7. Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* The beneficiary's U.S. patent is assigned to Roche Diagnostics. Dr. [redacted] who indicates that he is responsible for that company's development of blood glucose monitors, does not indicate that they have licensed or marketed the beneficiary's patented device. Thus, the impact of the device is not documented in the record. The record also contains little evidence regarding the impact that the beneficiary's devices patented in Germany have had.

Finally, the record is absent evidence of the improvements made by the beneficiary to Dr. [redacted] glucose sensor by the time of filing and their impact as of that date. Again, the record contains no independent evaluations of the beneficiary's work on this sensor by high level officials at the American Diabetes Association or any similar association.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

Initially, the petitioner submitted a single article authored by the beneficiary, although the beneficiary lists three other pre-doctoral articles on his curriculum vitae and several abstracts. In his request for additional documentation, the director requested evidence as to the significance of this article and its publication. In response to this request, the petitioner submitted a second article authored by the beneficiary. It is not clear whether this second article was published prior to the date of filing. Despite the petitioner's failure to comply with the director's request for evidence regarding the significance of the beneficiary's articles, the director concluded that the beneficiary met this criterion.

We cannot uphold the director's conclusion on this criterion. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces the Bureau's position that publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles.

The record contains no evidence that the beneficiary's work has been widely cited by independent researchers. Moreover, the number of articles published by the beneficiary is not significant. We cannot ignore that publication is inherent to the field of research. The resumes of three other researchers at the petitioning company reflect that two of them have authored 20 or more papers each. Dr. [redacted] indicates in his reference letter that he has published over 70 articles, including 10 review articles. Professor [redacted] and Dr. [redacted] indicate in their reference letters that they have authored over 100 articles each. Professor [redacted] asserts a total of 152 published articles. Thus, the record does not establish that the beneficiary's publication record places him as one of the very few at the top of his field.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

The petitioner indicated on the petition that it wished to employ the beneficiary as a senior sensor scientist. The petitioner submitted a job offer letter for this position dated March 19, 1999. In addition, the petitioner submitted a letter from its Vice President for Human Resources who asserted that the beneficiary plays a critical role for the petitioner. Further, the petitioner submitted a letter from its Vice President for Sensor Development and Manufacturing, Dr. [redacted] asserting that the beneficiary "is the lead scientist in our glucose sensor program, and his efforts are allowing us to meet the design specifications for the next generation product."

Subsequently, the petitioner submitted the petitioner's 1999 Annual Report and two newspaper articles reporting the acquisition of the petitioner by a major medical device developer. While the articles focus more on the business aspect of the merger, they assert that the petitioner is "a leader in the development and sale of diabetes management devices including insulin pumps."

While the director noted that one of the articles discussed a shareholder controversy regarding the price of the takeover, the director did not conclude that the petitioner does not have a distinguished reputation. Rather, the director concluded that the evidence was insufficient to establish that the beneficiary played a leading or critical role for the petitioner during his year there prior to filing the petition.

On appeal, counsel asserts that the shareholder controversy is irrelevant to the reputation of the petitioner. We concur, although, as stated above, while the director noted this controversy he did not challenge the reputation of the petitioner. Finally, counsel references Dr. [redacted] letter regarding the beneficiary's role at the petitioning company.

It is clear that the beneficiary plays a leading role for the petitioner's glucose sensor products. The question is whether this role constitutes a leading or critical role for the petitioner as a whole. We cannot conclude that every senior scientist at a large research firm plays a leading or critical role for that firm. While the sensor only accounted for .1 percent of net sales and profits in 1999, the FDA only approved the sensors in June 1999. Significantly, the 1999 annual report devotes two pages to the company's development of glucose sensors. The report states that the technology for the pump and sensor have not yet been combined but implies that this combination is necessary for the petitioner to reach its major goal of creating an artificial pancreas. Given the significance of this technology to the petitioner, we find that the record adequately establishes that the beneficiary, as the head researcher for this technology, plays a critical role for the petitioner.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

While the beneficiary's research is no doubt of value with tremendous potential, it can be argued that any research must be shown to present some benefit if it is to receive attention from the pharmaceutical or medical diagnostic industries. Contrary to counsel's assertion, it does not follow that every senior researcher working for a prestigious research firm is one of the very few at the top of his field and has sustained national acclaim. The record does not establish that the beneficiary's work is nationally viewed as representing a groundbreaking advance such that we can conclude that the beneficiary has attained national acclaim.

Review of the record does not establish that the beneficiary has distinguished himself as a researcher to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the beneficiary shows talent as a researcher, but is not persuasive that the beneficiary's achievements set him

significantly above almost all others in his field. Therefore, the beneficiary has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.